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NO. 88-2001

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RANDALL SILVER AND MIKALA SILVER, INDIVIDUALLY AND AS PARENTS AND NEXT OF KIN OF MICHAEL R. SILVER, DECEASED, MINOR CHILD,

Petitioners,

v.

FARMERS AND MERCHANTS INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JIM W. LEE, COUNSEL OF RECORD
MANVILLE T. BUFORD (OF COUNSEL ON BRIEF)
LEE, BEUCH, BUFORD, DUROCHER & MAURITSON
2728 Northwest 39th Street
Post Office Box 57320
Oklahoma City, Oklahoma 73157-7320
Phone: (405) 948-7730
ATTORNEYS FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

RANDALL SILVER and MIKALA SILVER, as parents and next of kin of MICHAEL R. SILVER, Deceased, Minor Child,	)	
Petitioners,	)	
vs.	)	Case No. 88-2001
FARMERS AND MERCHANTS INSURANCE COMPANY,	)	
Respondent.	)	

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OBJECTION TO JURISDICTION

Petitioners Randall Silver and Mikala Silver ("the Silvers") assert this Court's jurisdiction under the provisions of 28 U.S.C. §1257 authorizing their petition for certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States." Thereafter, the Silvers cite perceived entitlements--not

under the Constitution of the United States, nor, indeed, under its State constitutional counterpart--arising from the statutes of the State of Oklahoma and its courts' judicial construction thereof. Only passing reference is made to the federal and state constitutions and no authority is given that the proceedings before the courts of the State of Oklahoma were either (1) violative of due process or (2) involve a federal question. For reasons set forth hereafter, this Court should deny the Silvers' prayer for its assumption of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "*** nor shall any State deprive any person of . . .

property without due process of law; ****"

Title 36, Oklahoma Statutes 1981, §3636 (A) and (B) provides:

* * * *

"(A) No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection (B) of this section.

(B) The policy referred to in subsection (A) of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall be not less than the amounts or limits prescribed for bodily

injury or death for a policy meeting the requirements of Section 7-204 of Title 47, Oklahoma Statutes, as the same may be hereafter amended; provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured. The uninsured motorist coverage shall be upon a form approved by the State Board for Property and Casualty Rates as otherwise provided in the Insurance Code and may provide that the parties to the contract shall, upon demand of either, submit their differences to arbitration; provided, that if agreement by arbitration is not reached within three (3) months from date of demand, the insured may sue the tort-feasor."

* * * *

STATEMENT OF THE CASE

For purposes of Respondent's position, the "Statement of the Case" set forth in the petition may be accepted by this Court as complete; however, it may be helpful to condense the proceedings

below as reflected by Petitioners' Appendices.

Under the provisions of 36 O.S. 1981, §3636, insurers issuing automobile insurance policies in the State of Oklahoma *must* include uninsured motorist coverage of limits equal to the statutory minimum required for liability coverage *unless* the named insured rejects the uninsured motorist coverage *in writing*. It is undisputed below that the Silvers rejected in writing the coverage on their policy of insurance with Respondent ("Insurer") and that written rejections continued for each policy renewal period since 1975.

By amended petition,[1] the Silvers, as plaintiffs, alleged in substance that, by reason of an alleged failure of Insurer to explain correctly and fully

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[1]Petitioners' Appendix E, pp. 13-15.

the provisions of uninsured motorist insurance coverage to the Silvers, the Silvers rejected the coverage and, some eight years later, learned that the rejection had been improvident when their son was tragically killed in 1983 by an uninsured motorist. The Silvers assert, however, that the incorrect information allegedly given to them resulted in a lack of "informed consent to sign a rejection of such coverage."[2]

On the issue of whether the Silvers had made a "knowing waiver of (uninsured motorist) insurance coverage," the trial court found in favor of the Insurer upon a motion for summary judgment.[3]

The Silvers appealed to the Oklahoma Supreme Court which assigned the cause to Division No. 3 of the Oklahoma Court of

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[2]Petitioners' Appendix E, pp. 14-15.

[3]Petitioners' Appendix D, pp. 1-2.

Appeals for review.[4] The Court of Appeals held that "(t)he trial court erred in ruling as a matter of law there was a knowing and informed rejection of uninsured motorist coverage" by the Insurer and remanded the cause for trial.[5]

The Oklahoma Supreme Court assumed original jurisdiction and issued certiorari to the Court of Appeals to consider the issue ". . .(W)hether the terms of 36 O.S. 1981 §3636 impose an affirmative duty upon insurers to provide an explanation of uninsured motorist coverage (UMC) to the named insureds as

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[4]Under Oklahoma law, appeal is filed in the Oklahoma Supreme Court which may then assign the cause to a subordinate Court of Appeals. See, generally, Art. 7, §§1, 4, Okla. Const., 20 O.S. 1981, §30.1, 12 O.S. 1981, §952.

[5]Petitioners' Appendix C, p. 13-14.

an indispensable precondition for a statutorily effective rejection."[6]

The Oklahoma Supreme Court, in its opinion issued in May, 1988,[7] and corrected in February, 1989,[8] held that the language of §3636 imposed no such duty on the insurer[9] and, accordingly, the judgment of the trial court was affirmed.

ANALYSIS OF THE QUESTION PRESENTED

Although phrased in due process language, the Silvers pose the question whether the Oklahoma Supreme Court was arbitrary (1) in failing to follow the Oklahoma Pleading Code and (2) in failing to interpret the Silvers' initial

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[6]Petitioners' Appendix B, pp. 2-3.

[7]Petitioners' Appendix B, pp. 1 et seq.

[8]Petitioners' appendix A, pp. 1 et seq.

[9]Petitioners' Appendix, pp. 15-16.

petition as stating a cause of action in fraud.

No matter how one rearranges the words and phrases used in the Silvers' Petition for Certiorari, the result is the same, i.e., that the Silvers complain that the Oklahoma Supreme Court erred in construing Oklahoma law. Accordingly, this Court should determine itself to be without jurisdiction to alter the rulings below.

ARGUMENT

PETITIONERS PRESENT NO BASIS ON WHICH THIS COURT MAY GRANT THEM RELIEF.

Petitioners assert a denial of due process by reason of a perceived arbitrariness of the State courts in the consideration of their claim for uninsured motorist coverage. The Silvers alleged in their petition to the trial

court in substance that Oklahoma statutes required of an insurer a duty of proper, adequate and full explanation to an insured of the nature and scope of uninsured motorist coverage prior to permitting its insured to reject such coverage.[10] Instead, the Silvers alleged, the Insurer in this case, gave an incorrect explanation which is *now* said by the Silvers to constitute a species of fraud. The trial court disagreed and granted judgment as a matter of Oklahoma law on the issue of a "knowing waiver" of coverage.[11] The Court of Appeals disagreed and opined that Oklahoma law, specifically §3636 *supra.*, imposed with the trial court a duty upon an insurer for explicit explanation of the coverage waiver and whether a waiver was knowingly

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[10]Petitioners' Appendix E, pp. 13-15.

[11]Petitioners' Appendix D, pp. 1-2.

and voluntarily made became a question of fact.[12] The Oklahoma Supreme Court reversed the Court of Appeals and reinstated the decision of the trial court. The Supreme Court ruled that §3636 imposed no affirmative duty of explanation of uninsured motorist coverage as a precondition to waiver,[13] that without an insurer duty to explain the Silvers had no right to explanation,[14] and that no cause of action in fraud was available under Oklahoma law under the facts adduced in this case.[15]

A. *The Issues Treated Below, Grounded in State Law, Provide No Basis for Assumption of This Court's Jurisdiction.*

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[12]Petitioners' Appendix C, pp. 11-13.

[13]Petitioners' Appendix B, pp. 3, 16.

[14]Petitioners' Appendix B, p. 16.

[15]Petitioners' Appendix B, pp. 8-9, and footnote 8; Petitioners' Appendix A, p. 1-2, amended footnote 11.

This Court has not historically entertained constitutional questions in advance of strict necessity. See, e.g., *Parker v. Los Angeles County*, 70 S.Ct. 161, 338 U.S. 327, 94 L.Ed. 144 (1949); *Rescue Army v. Municipal Court*, 67 S.Ct. 1409, 331 U.S. 549, 91 L.Ed. 1666 (1947). Moreover, where the issues presented are intertwined with the application of State law--the constitutionality of which is not at issue--the exercise of this Court's jurisdiction is not warranted. *Duncan v. Tennessee*, 92 S.Ct. 785, 405 U.S. 127, 31 L.Ed.2d 86 (1972).

In the instant case, the Silvers do *not* allege that the statutes cited in their Petition are repugnant to the Constitution, *or* that the statutes created an unconstitutional class and placed them within such class, *or* that constitutional statutes were

unconstitutionally applied to them so as to deny Petitioners unequal protection, *or* that they were denied access to the full panoply of judicial process afforded the citizens of the State of Oklahoma under its constitution and laws.

What the Silvers do contend is that the Oklahoma Supreme Court (1) was too restrictive in its interpretation of the Oklahoma Pleading Code,[16] and (2) improperly applied its own court rules relating to summary judgment.[17]

By reason of alleged accumulated error in construing Oklahoma law, the

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[16]Petition, Subproposition A, pp. 8 et seq., Subproposition B, pp. 11 et seq.; Subproposition C, pp. 22 et seq., Subproposition E, pp. 26 et seq.

[17]Petition, Subparagraph D, pp. 24 et seq. Petitioners cite "Rule 13" as a federal rule, *see* Table of Authorities, p. viii; Rule 13, Rules of the Supreme Court for the District Courts of Oklahoma, 12 Okla. Stat. Ann., CH. 2, App. is substantially equivalent to Rule 56, Fed.R.Civ.P.

Silvers now claim that they were effectively denied their day in court. Indeed, as phrased by the Silvers, they were denied due process "by impact" of the Oklahoma Supreme Court ruling.[18] Phrased another way, the Silvers lost their claim for insurance coverage for which they neither contracted nor paid.

The decision of the Oklahoma Supreme Court construing Oklahoma laws, i.e., the Pleading Code, Supreme Court rules of procedure, the Insurance Code, etc., is binding on the courts of the United States, *Leeper v. Texas*, 11 S.Ct. 577, 139 U.S. 462, 35 L.Ed. 225 (1891); *Central Land Co. of W. Virginia v. Laidley*, 16 S.Ct. 80, 159 U.S. 103, 40 L.Ed. 91 (1895), and this Court should decline to review it.

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[18]Petition, p. 30.

B. An Erroneous Decision Below Does Not Equate to an Absence of Due Process

Respondent does not question the Silvers' generalized claim of entitlement to due process of law under the Fourteenth Amendment but states that all process that they were due was afforded in this highly contested legal proceeding that covered the years 1984 through 1989. No deficiencies of notice or rights to be heard are alleged. The Silvers appeared at all stages of the proceedings below and argued their cause at length. They lost the argument; they disagree with the Oklahoma Supreme Court's decision; they now seek another forum to correct their perceived errors in the construction of state law.

The due process clause of the Fourteenth Amendment does not incorporate the constitution and laws of the States

but leaves the States free to adopt, interpret and enforce their statutes and common law doctrines as each sees fit. *Buchalter v. People of the State of New York*, 63 S.Ct. 1129, 319 U.S. 427, 87 L.Ed. 1492 (1943). Even if the courts below were erroneous as a matter of law, a constitutional deprivation does not result,, *U.S. v. Ragen*, 247 F.2d 638 (7th Cir., 1959), cert. den. 78 S.Ct. 276, 355 U.S. 900, 2 L.Ed.2d 197, no matter how material the errors of the State courts may be. *Buchalter v. People of the State of New York, supra.*, at 319 U.S. 431.

The constitutional validity of the Oklahoma statutes cited by the Silvers is not challenged here and was not challenged below. Only the Oklahoma Supreme Court's construction of those statutes is at issue. As phrased in

Central Land Co. of W. Virginia v. Laidley, supra.,[19]:

* * * *

> "If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the constitution of the United States, but whether the highest court of the state has erred in its construction of the statute."

* * * *

Moreover, the Court in *Central Land Co.* concluded:[20]

* * * *

> "When the parties have been fully heard in the regular course judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the constitution of the United States."

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[19]16 S.Ct. at 82, 159 U.S. at 110.

[20]16 S.Ct. at 83, 159 U.S. at 112.

* * * *

CONCLUSIONS

For reasons stated, the Petition for Certiorari filed herein should be denied.

Respectfully submitted,

JIM W. LEE, Counsel of Record
MANVILLE T. BUFORD (Of Counsel on Brief)
Lee, Beuch, Buford, Durocher & Mauritson
2728 Northwest 39th Street
Post Office Box 57320
Oklahoma City, Oklahoma 73157-7320
Phone: (405) 948-7730

Attorneys for Respondent

PROOF OF SERVICE

I, JIM W. LEE, Counsel of Record for Farmers and Merchants Insurance Company, Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of June, 1989, I served a copy of the foregoing *Brief in Opposition to Petition for Certiorari* to the Supreme Court of the United States on Randall and Mikala Silver, the Petitioners herein, by delivering a copy thereof to Rex K. Travis, Esq., Counsel of Record for the Petitioners, at his office located at 100 Colcord Building, 15 North Robinson, Oklahoma City, Oklahoma 73102.

JIM W. LEE